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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

79-1514

BALTIMORE REBUILDERS, INC.,
Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent,

AND

INTERNATIONAL ASSOCIATION OF MACHINISTS
NATIONAL PENSION FUND (AFL-CIO), ET AL,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS REPLY TO BRIEF OF RESPONDENT AND INTERVENOR IN OPPOSITION TO PETITION FOR CERTIORARI

BAKER ARMSTRONG SMITH
MICHAEL ERNEST AVAKIAN
THE CENTER ON
NATIONAL LABOR POLICY
5211 Port Royal Road, Suite 400
North Springfield, Virginia 22151
(703) 321-9180

Attorneys for Petitioner,
Baltimore Rebuilders, Inc.

Of Counsel:

LEONARD E. COHEN
FRANK, BERNSTEIN,
CONAWAY & GOLDMAN
1300 Mercantile Bank & Trust Building
Baltimore, Maryland 21201

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I. OPPOSITION BRIEFS NOT TIMELY FILED

Both Respondent and Intervenor in this case failed to respond within the time limits prescribed by Rule 24(1). Respondent had until May 16, 1980 to file their brief in opposition, but filed its brief on May 21, 1980 —5 days late.

Intervenor, IAM National Pension Plan & Trustees, originally had thirty days in which to respond to the Petition for Certiorari. Upon a special request to the Clerk of this Court, they were granted a twenty day extension of time in which to file, until May 16, 1980. Intervenor filed its opposition brief on May 19, 1980—3 days late. The lateness has prejudiced Petitioner and has caused him delay and added expense.

II. OPPOSITION ARGUMENTS PUT A GLOSS ON THE TERMINATION OF EMPLOYEE BENEFITS

A. Business Convenience Has Never Been a Justification for Destruction of Employee Pension Rights

Respondent's and Intervenor's briefs continue to gloss over the contrast between legitimate business reasons for terminating worker pension credits and weak excuses for terminating a class of workers on the basis of their decertification vote. The former is proper Trustee action, while the latter is a non-business decision that effectively discriminates against workers who decertify their collective bargaining agent.

Respondent NLRB has never allowed administrative convenience to justify termination by an employer on the basis of a certification vote, yet it glibly articulates a different standard for the Intervenor union fund here. The Intervenor emphasis that it is not a "union" belies the fact that it administers a union pension fund agreement collectively bargained for by union officials and employers. Regardless of who is responsible, no compelling justification was advanced for the discrimination against decertifying employees and the concomitant destruction of their voting rights.

Thus this case presents a unique opportunity for this Court to resolve the fair and evenhanded applicability of the federal labor laws to employee pension rights.

Without a review by this Court, it is clear that the National Labor Relations Board will not protect employee voting rights against cleverly drafted union pension fund reprisals. This Court could clarify the existing controversy as to the proper test for "restraint or coercion" of employees under § 8(b)(1)(A) of the National Labor Relations Act ["NLRA"], 29 U.S.C. § 158(b)(1)(A).

This is particularly critical because of the billions of dollars of potential worker pension assets at stake that need protection here. The question of whether the NLRB will abdicate its worker protection responsibilities is even more important since there is no recourse under the Securities Acts. *International Bhd. of Teamsters* v. *Daniel*, 439 U.S. 55 (1979).

Respondents brief fails to come to grips with the central question involved in this case—does the IAM Pension Fund ["FUND"] apply an unlawful standard for dispensing pension benefits when it grants workers past service credits when they start contributing to the Fund and takes them away upon voting their union out.

Incredibly, Respondent cites as evidence of administrative justification, that decertification is just one of the causes for terminating worker pension credits. Workers lose them if their employer and union agree to join another plan, if their employer fails to make the required periodic contributions to the Fund, when

their employer is not obligated by a collective bargaining agreement, or if their union bargains to drop out of the fund. This only points out the lack of administrative justification in the instant case. Clearly, the above situations are non-worker business reasons for terminating benefits. These are situations where the employer or union acts or fails to act. However, when the employees act to undertake Section 7, NLRA protected activity, they lose all their benefits. There simply is no business justification for denying actuarially determined pension credits to workers who vote their union out, especially when the Fund finds it convenient to grant the benefits to workers whose employer goes out of business.

B. Double Standard for Coercion—One Standard for Employers and Another for Union Trustees—Militates for Review by This Court

Respondent's and Intervenor's continue to obfuscate the test for unlawful union action in violation of Section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A). Both say that the Fund rules "operate evenly against all unit employees regardless of their personal preference to keep or dismiss the union." (Intvr. 8, 611 F.2d at 1378).

But what effect will the operation of the rules have on worker *preferences*! The answer has been, in the case of employer termination, that it will influence, prejudice and deter employee preferences. *Kroger Co.* v. *NLRB,* 401 F.2d 682 (6th Cir. 1968); *Motor Wheel Corp.,* 180 N.L.R.B. 354 (1969); *Goodyear Tire & Rubber Co.,* 170 N.L.R.B. 539 (1968); *International Harvester Co.,* 169 N.L.R.B. 787 (1968); *Jim O'Connell, Inc.,* 123 N.L.R.B. 1639 (1959). Ludicrously, the

Board now wants a second standard to depend on who is prejudicing the employees. Employer prejudice would be outlawed, but union fund prejudice would not since it "operates evenly."

Yet, worker discrimination exists when pension benefits are retained for the one class of workers whose jobs are eliminated and lost for the decertifying class of workers whose jobs remain.

The opposing briefs also disregard and thus understandably fail to address the legal fact that the NLRA does not require "motive" or "intent" to be unlawful. The proper test under the circumstances of this case is whether the Article IX cancellation provision "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Local 542, International Union of Operating Eng.* v. *NLRB,* 328 F.2d 850, 852 (3d Cir. 1964), *cert. denied,* 379 U.S. 82 (1964). *See*: Pet. App. 19a-22a. Capacity to coerce or restrain is the test. An objective, not a subjective review is what the Fourth Circuit failed to apply to this "anti-selection" provision.

Singling out protected *employee* activity is coercion when the Fund can accept the actuary liability represented by workers whose employer contributes for a short period of time and then goes out of business, but not for the short period employer who stops contributing because his workers decertify their union.

The penalty is clear and admitted. As stated by the Fund Administrator, the object of the Fund provision "was to increase the incentive for employees covered by the Fund to prevent, whenever possible, withdrawal from the Fund by active employers." (Pet. App. 50a, 611 F.2d at 1378).

Clearly, no matter how much good faith the Fund may have believed the business reasons justified cancelling pension credits, they intended to deter lawful worker activity and punish those workers who elect to decertify their collective bargaining representative.

CONCLUSION

The discrimination and loss of benefits argued for in Respondent's and Intervenor's briefs and articulated in the Court of Appeals, militates all the more for a review and clarification of this coercion by this Court. For these reasons and those stated in his Petition, Petitioner respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

BAKER ARMSTRONG SMITH
MICHAEL ERNEST AVAKIAN
CENTER ON NATIONAL LABOR POLICY
5211 Port Royal Road, Suite 400
North Springfield, Virginia 22151
(703) 321-9180

Of Counsel:

LEONARD E. COHEN
FRANK, BERNSTEIN, CONAWAY & GOLDMAN
1300 Mercantile Bank & Trust Building
Baltimore, Maryland 21201

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